Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	Transmittal Nos. 873, 874, 893, 909, 910
GTE Telephone Operating Companies	)	CC Docket No. 94-81
	)	
Revisions to Tariff F.C.C. No. 1	)	

OPPOSITION TO APOLLO'S REQUEST FOR LEAVE TO FILE RESPONSE; IN THE ALTERNATIVE, GTECA'S REQUEST FOR LEAVE TO FILE A RESPONSE TO APOLLO'S RESPONSE

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Pursuant to Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, GTE California Incorporated (GTECA) respectfully opposes the Petition for Leave to File a Response to GTECA's Reply submitted by Apollo CableVision, Inc. (Apollo). However, if Apollo is granted leave, GTECA respectfully moves the Commission for corresponding leave to refute Apollo's mischaracterization of the facts.

I. INTRODUCTION.

In a desperate effort by Apollo, Apollo seeks to drum up "new issues" purportedly asserted by GTECA in its Reply in order to obtain yet another opportunity to rehash its previous arguments to the Commission. Accordingly, Apollo's Request for leave to file a response to GTECA's Reply should be denied. Nonetheless, if Apollo is granted leave to respond, GTECA should be afforded the opportunity to refute Apollo's mischaracterization of the facts.

In its response, Apollo contends the absurd -- that the Commission does not have Title II jurisdiction as to all aspects of GTECA's Cerritos video network and the provision of common carriage video signal transport to Apollo and Service Corp. Although the Commission may never have explicitly intoned the mantra "Title II

jurisdiction," as Apollo appears to deem necessary, the Commission has issued order after order over the past seven years exercising its Title II jurisdiction. Apollo's belated attempt to rewrite history is not well taken.

Similarly, Apollo reasserts its tired argument that the common versus private carrier status between Apollo and GTECA is still open for debate, despite (1) the Commission's rejection of this argument in the *Cerritos Order*, (2) the Bureau's contrary ruling in the July 14, 1994 Order, and (3) the very language of the tariff (Transmittal No, 893) which makes clear that GTECA's service is a general offering. Likewise, Apollo continues to dispute that GTECA's tariff filings were mandatory, contending that GTECA had other options, even though none of these other "options" *(i.e.*, divestiture) would have allowed continued provision of video signal transport to Apollo and/or GTE Service Corp. upon expiration of the waiver.

Finally, Apollo's insistence that Transmittal No. 909 is inapplicable as to Apollo's state court damage allegations is simply unfounded. This tariff governs the terms of the lease of the additional 39 channels for which Apollo specifically brings its state court action. Any damages flowing from Apollo's alleged inability to lease this bandwidth must necessarily turn upon *the actual cost* of leasing the bandwidth -- which is set by the tariff -- and which Apollo has specifically requested that the state court disregard.

Consequently, GTECA's request for declaratory relief as specifically set forth in its moving papers should be granted.

II. APOLLO'S REQUEST FOR LEAVE TO FILE SHOULD BE DENIED; HOWEVER, IF GRANTED, GTECA SHOULD BE ALLOWED TO REFUTE FACTUAL MISCHARACTERIZATIONS.

Apollo addresses no new issues in its Response to the Reply filed by GTECA in support of its Motion for Declaratory Ruling by this Commission. Instead, Apollo attempts to use these proceedings as another opportunity to rehash its arguments previously made with respect to the tariff investigation currently before the Commission. On this basis alone, Apollo's requested leave to file a response should be denied.

However, in the event this Commission grants Apollo's Request for Leave to File a Response, the Commission should correspondingly afford GTECA an opportunity to correct the factual misstatements set forth in Apollo's response. Consequently, GTECA's response will be limited only to those crucial issues which Apollo attempts to mischaracterize. With respect to all other matters, GTECA relies on its papers previously submitted and in no way concedes to any of Apollo's contentions revisited in its latest response.

III. GTECA'S RESPONSE.

A. This Commission Has Asserted Title II Jurisdiction Over the Cerritos Project.

Apollo mistakenly contends, that by granting Section 214 authority, the Commission "has only exercised some elements of Title II jurisdiction with respect to Cerritos" and that the Commission has never determined "that all aspects of Title II were applicable to the Cerritos system." Apollo Response, at 9-10 (emphasis in original). What Apollo wholly ignores, however, is that all parties, including the Commission, have been operating upon the basis of the Commission's assumption and exercise of Title II jurisdiction over GTECA's Cerritos video network. Indeed, in a

recent Ninth Circuit proceeding involving this case, the Commission devoted a substantial portion of its brief ellucidating the statutory framework of its Title II jurisdiction. *GTE California Incorporated v. Apollo CableVision, Inc.*, No. 94-56377 (9th Cir.), Brief for Appellee Federal Communications Commission, at 2-3.

B. As a Common Carrier, GTECA Must Comply with Title II Requirements, Including the Tariff Filing Provision of Section 203 in Order to Continue Provision of Video Signal Transport.

Once again, Apollo advances its tired assertion that GTECA's continued provision of video signal transport is one of private carriage. Apollo mistakenly believes that this issue is still under investigation. However, the Bureau rejected Apollo's contention in the July 14, 1994 Order which alowed the tariff to take effect and refused to designate Apollo's private carriage argument for investigation. July 14, 1994 Order, at 12-13.

As a common carrier providing video transport service to its customers, GTECA must comply with Title II of the Act, including Section 203(a), the rate filing provision which "commands that every common carrier shall file schedules showing all charges" and Section 203(c) which "mandates that carrier charge only the filed rate." *Southwestern Bell Telephone Co. v. F.C.C.*, 1995 WL 19336, at *2 (D.C. Cir. Jan. 20, 1995). Consequently, GTECA filed its original tariffs governing provision of service over each "half" of the bandwidth in April, 1994, to take effect upon expiration of the good cause waiver.

With respect to the tariffs themselves, the language of the tariffs specifically reflects the nature of GTECA's video transport service in Cerritos as a "general offering," rather than one designed to meet the "specific needs" of a particular

customer. For example, the rates and charges set forth in Transmittal No. 893 are applicable to the "Programmer For Channels 1 through 39" rather than specifically for Apollo; Apollo simply happens to be that programmer at this time. Transmittal No. 893, Section 18.4.1 (A). Similarly, Transmittal No. 909 governs the "Provision of [the other] 39 channels of the Video Channel Services Coaxial network in Cerritos, California"; Service Corp. happens to be the programmer on these channels at this time. Transmittal No. 909, Section 18.4.1(B)(1).[1] The specificity of GTECA's tariffs to reflect a general offering further confirms the common carrier status of GTECA's offering. Apollo's assertion to contrary is simply not supported by the facts of the case or the conduct of the parties or the Commission.

Likewise, Apollo's insistence that GTECA "chose" to file the tariffs is equally unfounded. True, the Commission did not *explicitly* direct GTECA to file the tariffs in order to come into compliance; however, in order comply with the explicit statutory requirements of Title II, the provision of video signal transport could only continue pursuant to a tariffed arrangement once the good cause waiver expired. To suggest that GTECA had a "choice" between filing its tariffs or divesting the entire network upon expiration of the good cause waiver is absurd on its face. As fuly set forth in GTECA's

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[1] In light of the subsequent revised tariff, Apollo's reference to GTECA's transmittal letter and "Description and Justifications" accompanying Transmittal No. 874 is inapplicable. Although GTECA did not submit an additional "Description and Justifications" section with Transmittal No. 909, the language of the actual tariff, as revised, controls.

Reply, the Commission has *never* suggested that divestiture would be required upon the expiration of the waiver.[2]

Because Apollo has continued to insist that GTECA's tariff filing was never required, but merely GTECA's "choice," GTECA has simply requested that the Commission lay this spurious argument to rest.

C. Transmittal No. 909 Currently Governs the Terms of the Use of the Excess Bandwidth, Regardless of Who Operates It.

Apollo's assertion that Transmittal No. 909 does not apply to its requested relief in state court is plainly wrong. Transmittal No. 909 governs the terms and conditions of the specific bandwidth over which Apollo brings its lawsuit. The state court must look to the terms of the tariff, including the lease rate for the 39 channels -- the same rate which was offered to and rejected by Apollo -- in order to determine Apollo's damages (if any). But Apollo has specifically asked the state court to ignore the tariff rate. Rather, Apollo has asked the state court to make a judicial evaluation of the reasonableness of the tariffed rate, and to reject the tariffed rate in favor of some other, yet unstated, "reasonable rate." This issue was thoroughly addresssed in GTECA's papers and will not be repeated here. Apollo's purported failure to understand how this judicial determination infringes upon this Commission's regulatory authority over common carrier service is simply incredulous.

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[2] Apollo's reference to this Commission's decision on remand that GTECA would not suffer irreparable harm if the five year waiver was terminated four months early must be discounted in light of the stay of that order by the Ninth Circuit. *GTE California Inc. v. F. C. C.*, No. 93-70924, Order (9th Cir. Jan. 5, 1994).

D. Apollo's Damage Claim, Whether Phrased as a "Rebate" or "Preference," Violates the Filed Rate Doctrine.

Apollo's assertion that "there are no decisions . . . construing Section 203(c) of the Act . . . as GTE here urges[]" is misguided. Apollo Response, at 5. Apollo's hair splitting distinctions between GTECA's use of the terms "rebate" and "preference" are manifestly irrelevant. The case law cited throughout GTECA's papers discussing the filed rate doctrine use the terms interchangeably. *See, e.g., Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922) (recovery of damages from the exaction of a higher rate would, like a rebate, operate to give the shipper a preference over his competitors); *Marco Supply Co. v. AT&T Communications*, 875 F. 2d 434, 436 (4th Cir. 1989) (damages based on a lower rate quote, even if willfully misrepresented, would be giving a preference to and discriminating in favor of the customer in question). These cases, although discussing the anti-discriminatory provision of the Interstate Commerce Act, properly have been cited in cases construing the equivalent Section 203(c) of the Communications Act. *U.S. Wats. Inc. v. American Tel. and Tel. Co.*, 1994 U.S. Dist. LEXIS 4074, *6-7, *13 (E.D. Pa. 1994). Thus, the bottom line is that an award of damages which, *by necessity*, sumsumes rate *different from* the tariff rate violates the filed rate doctrine by giving the customer an unlawful privilege, regardless if termed as a "rebate" or "preference."

In *Wegoland Ltd., v. NYNEX Corp.*, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992), the court identified "two companion principles [that] lie at the core of the filed rate doctrine: first, that legislative bodies design agencies for the specific purpose of setting uniform rates, and second, that courts are not well suited to engage in retroactive rate-setting." Here, Apollo's requested state court relief violates both

principles by seeking to enforce a contract rate which may be at odds with the uniform tariffed rate, and by requiring a judicial retroactive rate determination of the "reasonable rate" of the bandwidth currently operating pursuant to tariff.

IV. CONCLUSION.

For all the reasons stated herein and in GTECA's moving papers already submitted, this Commission should expeditiously grant GTECA's Motion for Declaratory Relief.

Respectfully submitted,

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Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Opposition to Apollo's Request for Leave to File Response; In the Alternative, GTECA's Request for Leave to File a Response to Apollo's Response" have been mailed by first class United States mail, postage prepaid, on the 7th day of April, 1995 to the parties on the enclosed list.

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